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No. 90-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CARRIERS CONTAINER COUNCIL, INC.,
Petitioner,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC., INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO PENSION PLAN AND TRUST, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Question Presented

Did the Court of Appeals correctly analyze the facts and collectively bargained agreements upon application of the "contributing obligor" test, which Petitioner Carriers Container Council, Inc. ("CCC") concedes is the correct test, to determine that CCC is an "employer" subject to withdrawal liability pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

Parties

This brief is directed only to the issue raised in *Carriers Container Council, Inc. vs. Mobile Steamship Association, Inc. etc.*, bearing case nos. 89-7279 and 89-7451 in the United States Court of Appeals for the Eleventh Circuit (the "withdrawal liability case"). In the Court of Appeals, the withdrawal liability case was consolidated with *Carriers Container Council, Inc. vs. Mobile Steamship Association, Inc., et al.*, bearing case no. 89-705 (the "surplus case"). The withdrawal liability case and the surplus case are separate cases decided by different district judges. A separate brief in opposition to the Petition will be filed by all of the Mobile and Philadelphia Respondents to the surplus case, including the Mobile Pension Plan. The parties to the withdrawal liability case are:

A. Petitioner:

Carriers Container Council, Inc., successor to JSP Agency, Inc. ("JSPA"). According to the Petition for A Writ of Certiorari, CCC has no parent or subsidiary companies.

B. Respondents:

Mobile Steamship Association, Inc. - International Longshoremen's Association, Inc., AFL-CIO Pension Plan and Trust ("Mobile Pension Plan") and its Trustees F. D. Alspaugh, Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, Felix Cleveland, Henry L. Clarke, Albert Walton, Jr. and Seymour Irby.

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Opinions Below

The opinion of the Court of Appeals, which is reported at 896 F.2d 1330 (11th Cir. 1990), is reproduced as Appendix A (App. A at 1a-29a) to CCC's Petition for a Writ of Certiorari. The Court of Appeals' order denying CCC's Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 904 F.2d 28 (11th Cir. 1990) and is reproduced as Appendix E (App. E at 86a-87a) to CCC's Petition for a Writ of Certiorari. The March 21, 1989 opinion and judgment of the District Court is reproduced as Appendix C (App. C at 58a-80a) to CCC's Petition for a Writ of Certiorari. The May 5, 1989 order of the District Court is reproduced as Appendix D (App. D at 81a-85a) to CCC's Petition for a Writ of Certiorari.

Jurisdiction

The Petition for a Writ of Certiorari was filed by CCC within 90 days of the date the Court of Appeals denied CCC's Petition for Rehearing and Suggestion of Rehearing En Banc. CCC invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Statutes

Some of the statutes involved are set out in CCC's Petition for a Writ of Certiorari at pages 3-6. In addition to those statutes, the case involves the following statute:

Section 4001(b)(3) of ERISA, 29 U.S.C. § 1301(b)(3):

"§ 1301. Definitions

. . .

(b)(3) For purposes of this subchapter, ex-

cept as otherwise provided in this subchapter, contributions or other payments shall be considered made under a plan for a plan year if they are made within the period prescribed under section 412(c)(10) of Title 26."

Statement of the Case[1]

Longshore Collective Bargaining

The International Longshoremen's Association, AFL-CIO ("ILA") is a labor organization of waterfront employees engaged in longshoring and related operations in ports on the Atlantic and Gulf Coasts of the United States, including the Port of Mobile, Alabama. The ILA is the collective bargaining representative for its members in connection with certain "master" terms of employment which apply in all ports, including Mobile. The ILA has affiliated local unions in Mobile, including ILA Locals 1410, 1410-1 and 1459 (the "Mobile Locals").

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[1] In the "Introduction" to CCC's Petition, CCC states that the lower courts' decisions "have had a chilling effect on coastwide longshore labor negotiations" and that "[m]anagement and labor are reluctant to enter into similar labor agreements". Pursuant to Supreme Court Rule 15.1, the Mobile Pension Plan calls to this Court's attention that such statements are not supported anywhere in the record, and they are not true. CCC successfully negotiated with the ILA an extension of the collective bargaining agreement following the District Court's decision in this case. For an accurate and complete statement of the undisputed facts in the record, the Mobile Pension Plan incorporates the District Court's findings of fact which are found in the appendix to CCC's petition at C-59a through C-69a. The following "Statement of the Case" summarizes the facts.

Mobile Steamship Association, Inc. ("MSA") is an Alabama not for profit membership corporation, and it is a multiemployer bargaining association, composed of various waterfront employers. MSA negotiates and enters into collective bargaining agreements with the Mobile Locals on behalf of MSA's employer members, which include stevedores and others.

Respondent Mobile Pension Plan is a joint labor-management trust which administers a multiemployer employee benefit pension plan, within the meaning of 29 U.S.C. § 1002(2), (3) and (37) and § 1301(a)(3), providing pension benefits to eligible longshore workers from the Mobile Locals.

Vessels calling at the Port of Mobile are operated by vessel carriers. These carriers retain stevedoring companies to load and unload the carrier ships. Stevedoring companies bound by collectively bargained ILA contracts use workers from the ILA Locals for this purpose.

Longshore collective bargaining traditionally has involved a two-tier structure. First, the ILA negotiates a "Master Agreement" with a combined management group which is composed of employer associations in ports from Maine to Texas, including since 1980, MSA. This Master Agreement fixes the master terms of employment which apply in every ILA port: wages, hours, term of contract, pension contributions, welfare contributions, containerization and LASH. When agreement is reached on these master terms, local terms and conditions are negotiated in the individual ports, including Mobile.

The local collective bargaining agreements address local terms and conditions including seniority, hiring practices, safety, vacations, holidays and other matters of local concern. In Mobile, these agreements also pre-

scribe a specific contribution rate per hour worked by the longshoremen, which amount is the total contribution rate per man-hour established in the Master Agreement. The parties to the local collective bargaining agreements then allocate the total contribution rate per man-hour among the various Mobile plans, including the Mobile Pension Plan.

The JSP Agreements

In 1977, Master Agreement negotiations broke down over the issue of job security. The employer associations were unable to deal with ILA demands for some form of protection for longshore employee benefit plans from the effects of declining contribution levels caused by the decision of vessel carriers to bypass ports at which their vessels had historically called. Containerization, or the transport of cargo in large, reusable metal receptacles, enabled carriers to concentrate their vessel calls at one or two load center ports to or from which the containers could be trucked. The elimination of vessel calls at ports by some carriers diminished the man-hours or work performed by ILA longshore employees at those ports, as well as the contributions to their pension funds.

The impasse on this critical issue of job security precipitated the 1977 selective strike against container carriers in all ports from Maine to Texas, which was resolved when vessel carriers directly negotiated the first JSP Agreement of November 13, 1977 with the ILA and its affiliated local unions in each port from Maine to Texas, including the Port of Mobile.

Under the 1977 JSP Agreement, the carriers recognized the ILA as the collective bargaining agent of employees "employed to load and unload the carrier ships"

and acknowledged that the carriers had "bargained with the ILA on the issue of job security" for those employees. Paragraph 1(b) of the 1977 JSP Agreement provided:

> (b) Purpose of the job security program. The new job security program (JSP) concept is to be undertaken by the carriers in order to protect and preserve the job security of employees represented by the ILA in each of the ports listed in Appendix A [including the Port of Mobile] and to protect the local port plans described in paragraph 2 hereof [including pension plans] from shortfalls which take place after October 1, 1977.

The "JSP Tonnage Assessment" Appendix B to the 1977 JSP Agreement, obligated the carriers to pay a specified amount for each ton of cargo loaded or unloaded by ILA labor at the covered ports, including Mobile, and further provided:

> Such tonnage assessment amount shall be collected as necessary from the carriers by the administrative agency (to be known as the JSP Agency) created by the carriers, which shall pay out the shortfall payments required by this agreement. . . . The JSP Agency shall pay out such amounts only for obligations under the JSP program and the expenses of administration thereof.

The 1977 JSP Agreement and Appendix B to the JSP Agreement were both referred to in, and appended to, the 1977 Master Agreement.

Shortly after execution of the 1977 JSP Agreement, CCC, then known as JSPA, was formed by the carriers to administer the JSP program and to pay out shortfall payments required by the JSP Agreement.

On May 27, 1980, a Master Agreement was entered into between various employer associations, including MSA, and the ILA. Again, the Master Agreement incorporated the JSP Agreement. The Master Agreement was signed by the various employer associations, including MSA and by the ILA and its various district officers.

Although the Master Agreement for the period October 1, 1983 through September 30, 1986, contained a provision that "the JSP program shall be updated and extended by the carriers", no new JSP Agreement covering that period was ever signed. For the contract period 1983 to 1986, JSPA/CCC used an unsigned copy of the JSP Agreement and the 1983-1986 Master Agreement to administer the JSP program.

On September 5, 1986, the ILA executed a Master Agreement with several employer associations and CCC which provided as follows:

> The job security program shall be discontinued as of October 1, 1986, except for the purpose of meeting any obligations of the fund under the existing agreement. Any surplus, after all such obligations have been satisfied, shall be discussed with the ILA.

The claim by the Mobile Pension Plan that CCC had incurred withdrawal liability and the following litigation.

On December 21, 1987, the Mobile Pension Plan wrote CCC that the Mobile Pension Plan had determined that CCC completely withdrew from the plan during the plan year ended September 30, 1987. The letter further advised that, pursuant to ERISA § 4219 (29 U.S.C. § 1399), CCC was to make payments to the plan for

withdrawal liability in amounts and at times specified in the letter. By letter dated January 12, 1987 (sic), CCC requested the plan to review its determination that CCC was liable for withdrawal liability. The letter further demanded arbitration under terms of ERISA § 4221 (29 U.S.C. § 1401).

On February 4, 1988, CCC filed suit against the Mobile Pension Plan seeking, among other things, a declaration that CCC was not subject to withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). CCC and the Mobile Pension Plan filed cross motions for summary judgment. The District Court concluded that CCC was an "employer" subject to withdrawal liability, and the Court directed the parties to proceed with the arbitration initiated by CCC for the purpose of determining the amount of CCC's withdrawal liability.

CCC appealed the District Court's decision to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals upheld the District Court's decision on the issue presented to this Court in CCC's Petition for a Writ of Certiorari. CCC now petitions this Court for a writ of certiorari to the Eleventh Circuit Court of Appeals, claiming that the District and Circuit Courts misapplied the facts to the test which CCC concedes is applicable to determine whether CCC is an "employer" for purposes of MPPAA.

Summary of Reasons for Denying the Writ

The Petition should be denied because CCC seeks a review of the facts and not of the law. Because the facts are unique, the importance of the case is limited to the parties to it. Constitutional "concerns" are not a basis for review because CCC did not raise the "concerns" in the

District Court. Finally, the petition should be refused because the courts below correctly concluded that CCC was a party to collectively bargained agreements obligating CCC to make contributions to the Mobile Pension Plan, potentially exposing CCC to withdrawal liability when CCC's obligation to contribute ceased under the collectively bargained agreements.

Reasons for Denying the Writ

— *CCC seeks review of the facts as applied to a legal test which CCC concedes is the correct legal test.*

CCC sought to avoid its obligation to make withdrawal liability payments to the Mobile Pension Plan by claiming that it was not an "employer" for purposes of the withdrawal liability provisions, 29 U.S.C. § 1381 *et seq.* In order to decide the issue, the District and Circuit Courts had to determine the legal standard or test to be applied to decide the issue. Since the withdrawal liability provisions, enacted as an amendment to ERISA, have no definition of "employer" themselves, the Courts looked to the statutory intent and cases addressing the question to conclude that the "contributing obligor" test was applicable. *See Carriers Container Council, Inc. v. Mobile Steamship Assoc.*, 896 F.2d at 1343 (App. to Petition at A-21a and A-22a) and *Carriers Container Council, Inc. v. Mobile Steamship Assoc.*, (S.D. Ala. Mar. 21, 1989) (App. to Petition at C-72a and C-73a).

Under the "contributing obligor" test, drawn from Title 1 of ERISA, an "employer" is one "who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants".

Id.[2] Using the contributing obligor test, both the District and Circuit Courts found CCC to be an "employer" liable for withdrawal liability. *See Carriers Container Council, Inc. v. Mobile Steamship Assoc.*, 896 F.2d at 1344 (App. to Petition at A-23a and A-24a) and *Carriers Container Council, Inc. v. Mobile Steamship Assoc.*, (S.D. Ala. Mar. 21, 1989) (App. to Petition at C-76a and C-77a).

Now CCC petitions this Court–*not to* review the lower courts' conclusion that the "contributing obligor" test is the applicable legal standard, *but to* review the "application of that standard to the particulars of this case". Petition at p. 16. CCC "does not take exception to the contributing obligor test" itself. *Id.*

Contrary to CCC's claim that the case presents "an important question", CCC and the Mobile Pension Plan, the only parties to this case, are apparently in agreement as to how the question is to be resolved, *i.e.*, whether an entity is an "employer" and liable for withdrawal liability is determined by the "contributing obligor" test. There is no legal question to resolve as to these parties–only a question as to the facts. A factual controversy is not an "important question" meriting review by this Court. *See Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1923); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918).

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[2] The Title I definition of "employer" is ". . . any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5).

The case turns on facts and collectively bargained agreements which were unique and which no longer exist.

The collectively bargained JSP Agreement, which obligated CCC to make shortfall payments to local port plans, including the Mobile Pension Plan, was terminated effective October 1, 1986, except for the purpose of meeting any obligations under the JSP Agreement which accrued before that date. It is provisions of this terminated collectively bargained JSP Agreement, and the facts and relationships which caused the JSP Agreement to exist, which CCC petitions this Court to review. Since CCC has not asked the Court to review questions of law but of fact, and since those facts are unique and dated, the importance of this case is limited to the parties to it.

Constitutional questions are not properly presented by the Petition since such questions were not preserved for review.

CCC says that "the appellate court's holding implicates the [constitutional] concerns raised by the two concurring justices in *Connolly.*" Petition at p. 17. However, CCC never contended in the District Court that the withdrawal liability provisions of MPPAA were unconstitutional as applied to it. Although CCC did attempt to present the question to the Court of Appeals, the Court of Appeals did not decide those questions. This Court should not exercise its jurisdiction to decide constitutional questions not raised or decided below. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

The decisions of the Courts below are correct.

The JSP Agreement is a collectively bargained agreement entered into by the carriers and the ILA on behalf

of the ILA locals. Under the JSP Agreement, the carriers obligated themselves to make payments to local ILA fringe benefit plans, including the Mobile Pension Plan. The payments were funded by assessments paid by the carriers for cargo loaded or unloaded by the ILA. In exchange, the ILA agreed to load and unload the carriers' vessels.

JSPA (now CCC) is an association of those carriers which are parties to the JSP Agreement. CCC was formed by the carriers for the sole purpose of collecting the assessments and making payments to the fringe benefit plans under the JSP Agreements. Since the carriers benefited from ILA labor, since the carriers were obligated under the collectively bargained JSP Agreement with the ILA to contribute to the Mobile Pension Plan, and since CCC acted on behalf of the carriers to make the contributions, it is logical and fair that CCC is deemed an "employer" liable for withdrawal liability under MPPAA.

CCC says that the Court of Appeals, in applying the "contributing obligor" test, should look not only to whether CCC promised contributions to the Mobile Pension Plan, but also to whether CCC promised benefits under the Mobile Pension Plan. This is true, says CCC, because withdrawal liability is imposed only against those employers who "cease to have an obligation to contribute *under* the plan". 29 U.S.C. § 1383(a)(1) (emphasis added). CCC seizes on the word "under" in the statute to claim that it owes no withdrawal liability payments because it never made any promises to pay

benefits under the Mobile Pension Plan and was never a party to the Mobile Pension Plan.[3]

Because it is directly addressed by the provisions of MPPAA, CCC's argument was properly disposed of by the Court of Appeals. An "obligation to contribute" does not arise only "under a plan", but can arise "under one or more collective bargaining (or related) agreements" such as the JSP Agreement, the Master Agreement and the local agreements. 29 U.S.C. § 1392(a)(1). Additionally, under the "definitions" section of MPPAA, contributions made "under" a plan are simply those contributions or payments made to a plan within a prescribed period. 29 U.S.C. § 1301(b)(3). There is no special significance to the use of "under" rather than "to" in the statute.

CCC also argues that the Court of Appeals erred when it wrote that "withdrawal liability is calculated on the basis of [employer contributions] . . . and not on the basis of the benefits that the employer promised to supply the plan participants." *Carriers Container Council, Inc. v. Mobile Steamship Association*, 896 F.2d at 1344 (App. to Petition at A-23a). CCC argues that it can contractually absolve itself of any responsibility for withdrawal liability payments, in spite of the provisions of

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[3] Like CCC, none of the Mobile employers promise benefits under the collective bargaining agreements. They only promise to make contributions in an amount set in the Master Agreement and local agreements. The plan itself says that the trustees cannot obligate the contributing employers for amounts beyond the financial resources of the trust. Just as CCC is subject to withdrawal liability under MPPAA because of its obligation to contribute, the Mobile employers are subject to withdrawal liability under MPPAA because of their promise to contribute.

MPPAA, by a contractual declaration that CCC will "protect . . . contributions in the . . . plans and not the benefits provided by such plans." This Court disposed of just such an argument in *Connolly v. PBGC*, 475 U.S. 211 (1986) when it held that provisions in a pension trust attempting to limit an employer's liability under the trust cannot defeat the withdrawal liability provisions of MPPAA, which is a regulatory statute within the province of congress to enact. *Id.* at 224. The Court of Appeals properly disposed of CCC's technical statutory construction arguments.

Conclusion

For the foregoing reasons, CCC's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit is due to be denied.

Respectfully submitted,

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